Leong Peng Kheong & Anor v Dawntree Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S6-22-12 OF 2000
AZMEL J
18 NOVEMBER 2001

Civil Procedure *— Striking out — Application to strike out action — Unconditional appearance entered, whether application to strike out under O 18 r 19(1)(a) Rules of the High Court 1980 should be allowed — Issue of locus standi, whether court completely lacked jurisdiction to entertain claim — Application made conjunctively under r 19(1)(a), (b), (c) and (d) — Defence already filed, whether fatal to application to strike out*

The defendant applied before the senior assistant registrar ('SAR') to strike out the plaintiffs' writ of summons and statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). The application was made after the defendant had filed an unconditional appearance and its statement of defence. At the commencement of the hearing of this application, the plaintiffs raised a preliminary objection based on two grounds, namely: (i) that the defendant failed to comply with the requirements of O 18 r 19(1) of the RHC in that the defendant's application under r 19(1)(a) of the RHC, (b), (c) and (d) should be made disjunctively and not conjunctively as done by the defendant in this case; and (ii) that for an application under O 18 r 19(1) of the RHC on the issue of locus standi, it was incumbent upon the applicant to file a conditional appearance and not an unconditional appearance as in this case. The learned SAR held that the plaintiffs' second preliminary objection be dismissed but allowed the plaintiffs' first preliminary objection and ordered that the defendant's application be struck out. Both parties appealed.

Held, dismissing the defendant's appeal and allowing the plaintiffs' appeal:

(1) The defendant, in its application, had included para (a) together with the other paras (b), (c) and (d) of r 19(1). As clearly stated in r 19(2), on an application under para (1)(a) 'no evidence shall be admissible'. In this case, the defendant had not only filed an affidavit in support but also the statement of defence. Hence, the prohibition contained in para (2) of r 19 had been breached. Such being the status of the procedural defects of the defendant's application, instead of filing this appeal against the order of the learned SAR, the defendant should have straightaway filed a fresh summons in respect of the same application. In the circumstances, the defendant's appeal was dismissed with costs (see p 190F–H); *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 followed.

(2) The defendant's application to strike out the writ and statement of claim must fall under para (a) of O 18 r 19(1) since the issue was on locus standi which in fact concerned the jurisdiction of the

court. Such application, by virtue of r 19(2), the applicant must file a conditional appearance. In order for the defendant to succeed in an application under O 18 r 19(1)(a) after having entered an unconditional appearance, the cause of action must be such where the court lacked jurisdiction to entertain the claim at all (see p 192E–F); *'The Avro International'; 'The Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147 and *Wilkinson v Barking Corp* [1948] 1 KB 721 followed. However based on the facts of the case, the court was unable to conclude that it could come within this exception because the plaintiff's assertion was a matter which the court would have jurisdiction (see p 192F); *YAM Tengku Iskandar ibni Almarhum Tengku Ahmad lwn Majlis Perajaan Negeri Kelantan & satu lagi* [1997] 2 MLJ 555 distinguished. Therefore, the court allowed the plaintiffs' appeal with costs (see p 192G).

[Bahasa Malaysia summary

Defendan telah memohon kepada penolong kanan pendaftar ('PKP') supaya writ saman plaintif-plaintif bertarikh 7 Januari 2000 dan penyata tuntutan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dibatalkan. Permohonan ini telah dibuat setelah defendan memasukkan kehadiran tanpa syarat dan memfailkan penyata pembelaannya. Pada permulaan perbicaraan permohonan tersebut, plaintif-plaintif telah membangkitkan bantahan awal berdasarkan dua alasan, iaitu: (i) defendan gagal mematuhi peruntukan A 18 k 19(1) KMT kerana permohonan defendan di bawah k 19(1)(a) KMT, (b), (c) dan (d) sepatutnya dibuat tanpa berkait dan bukannya berkait seperti yang dilakukan oleh defendan dalam kes ini; dan (ii) bagi satu permohonan di bawah A 18 k 19(1) KMT atas isu locus standi, adalah kewajipan pemohon untuk memfailkan kehadiran bersyarat dan bukannya kehadiran tanpa syarat seperti dalam kes ini. Penolong kanan pendaftar memutuskan bahawa bantahan awal kedua-dua plaintif ditolak tetapi beliau membenarkan bantahan awal pertama plaintif dan mengarahkan agar permohonan defendan dibatalkan. Kedua-dua pihak merayu.

Diputuskan, menolak rayuan defendan dan membenarkan rayuan plaintif-plaintif:

(1) Defendan, dalam permohonannya, telah menyertakan perenggan (a) bersama perenggan-perenggan yang lain (b), (c) dan (d) k 19(1). Seperti yang jelas dinyatakan dalam k 19(2), bagi satu permohonan di bawah perenggan (1)(a), 'tiada keterangan boleh diterima'. Dalam kes ini, defendan bukan sahaja memfailkan afidavit sokongan tetapi juga pernyataan pembelaan. Oleh itu, larangan yang terkandung di dalam perenggan (2) k 19 telah dilanggar. Memandangkan kecacatan prosedur sebegini dalam permohonan defendan, defendan seharusnya terus memfailkan

satu saman baru bagi permohonan yang sama dan bukannya memfailkan rayuan ini menentang perintah PKP. Dalam hal keadaan ini, rayuan defendan ditolak dengan kos (lihat ms 190F–H); *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 diikut. A

(2) Permohonan defendan untuk membatalkan writ serta pernyataan tuntutan tersebut mesti jatuh di bawah perenggan (a) dalam A 18 k 19(1) kerana isu tersebut adalah mengenai locus standi yang sebenarnya berkaitan dengan bidang kuasa mahkamah. Dalam permohonan sebegini, menurut k 19(2), pemohon mestilah memfailkan kehadiran bersyarat. Agar defendan berjaya dalam satu permohonan di bawah A 18 k 19(1)(a) setelah memasuki kehadiran tanpa syarat, kausa tindakan mestilah dalam situasi di mana mahkamah tidak mempunyai sebarang bidang kuasa untuk melayan tuntutan tersebut (lihat ms 192E–F); *'The Avro International'; 'The Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147 dan *Wilkinson v Barking Corp* [1948] 1 KB 721 diikut. Walau bagaimanapun, berdasarkan fakta-fakta kes ini, mahkamah gagal mencapai keputusan bahawa ia dapat diliputi pengecualian ini kerana penegasan plaintif merupakan satu perkara yang jatuh di bawah bidang kuasa mahkamah (lihat ms 192F); *YAM Tengku Iskandar ibni Almarhum Tengku Ahmad lwn Majlis Perajaan Negeri Kelantan & satu lagi* [1997] 2 MLJ 555 dibeza. Oleh itu, mahkamah membenarkan rayuan plaintif dengan kos (lihat ms 192G).] B C D E

Notes F

For cases on striking out, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5604–5650.

Cases referred to G

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

'Avro International, The'; 'The Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 (folld)

Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor [1999] 4 MLJ 629 (refd) H

Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd [1998] 4 MLJ 129 (folld)

Sambu (M) Sdn Bhd v Stone World Sdn Bhd [1996] MLJU 510 (refd)

Wilkinson v Barking Corp [1948] 1 KB 721 (folld) I

YAM Tengku Iskandar ibni Almarhum Tengku Ahmad lwn Majlis Perajaan Negeri Kelantan & satu lagi [1997] 2 MLJ 555 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (2)

TT Ng (*Kam Woon Wah*) for the plaintiffs.
Lee Siew Kin (*Khaw & Partners*) for the defendant.

Azmel J: Under encl 10, the defendant in this case applied before the learned senior assistant registrar ('SAR') to strike out the plaintiffs' writ of summons dated 7 January 2000 and the statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). This application was made after the defendant had filed an unconditional appearance as well as its statement of defence.

At the commencement of the hearing of this application before the SAR, the counsel for the plaintiffs raised a preliminary objection based on two grounds namely:

(i) that the application was not in compliance with the requirements of O 18 r 19(1) of the RHC; and

(ii) that the application was not in accordance with the principle as laid down in the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, in that for an application under O 18 r 19(1) of the RHC, if the issue is on locus standi, it is incumbent upon the applicant to file a conditional appearance and not an unconditional appearance as in this case.

In respect of the preliminary objection raised by the plaintiffs, the learned SAR came to the following rulings:

(i) that the defendant failed to comply with the requirements of O 18 r 19(1) of the RHC in that the defendant's application under r 19(1)(a) of the RHC, (b), (c) and (d) should be made disjunctively and not conjunctively as done by the defendant in this case;

(ii) that there is no provision which requires an applicant to file a conditional appearance when raising the issue of locus standi under O 18 r 19(1) of the RHC.

Consequently, the learned SAR held that the plaintiffs' second preliminary objection be dismissed. However, she decided to allow the plaintiffs' first preliminary objection and ordered that the defendant's application be struck out with liberty to file afresh.

Against the ruling of the SAR allowing the plaintiffs' first preliminary objection and striking out the defendant's application, the defendant filed an appeal to the judge in chambers (encl 13). The plaintiffs also appealed against the ruling of the SAR for rejecting the plaintiffs' second preliminary objection (encl 14).

I shall deal with the defendant's appeal first. It concerned mainly with the provision of O 18 r 19(1) of the RHC which must be read together with r 19(2). It reads as follows:

(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under para (1)(a).

There have been several decisions on this issue. I only need to refer to the case of *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 since the issue raised in that case is quite similar to the instant case before me. I only need to quote the holding of the Court of Appeal as stated in the headnotes:

> The whole process of appealing to this court in a matter such as this was trifling. In effect all that the appellant had to do was to file his summons again and by then he should be wary of using the offending cumulative word 'and' between ground (a) and ground (b) in his summons, instead of wasting time and money on an appeal. The *de minis* principle would therefore apply here.

(see also *Sambu (M) Sdn Bhd v Stone World Sdn Bhd* [1996] MLJU 510 and *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor* [1999] 4 MLJ 629).

The defendant, in its application, had included para (a) together with the other paras (b), (c) and (d) of r 19(1). As clearly stated in r 19(2) on an application under para (1)(a) 'no evidence shall be admissible'. In this case, the defendant had not only filed an affidavit in support but also the statement of defence. Hence, the prohibition contained in para (2) of r 19 had been breached. Such being the status of the procedural defects of the defendant's application, it should automatically heed the advice given by the Court of Appeal in the *Pegasus* case. Instead of filing this appeal against the order of the learned SAR, the defendant should have straightaway filed a fresh summons in respect of the same application. In the circumstances and for the grounds as stated above, I dismissed the defendant's appeal with costs.

I shall now deal with the appeal by the plaintiffs, ie the decision of the learned SAR in rejecting the plaintiffs' second preliminary objection. It was the contention of the plaintiffs that since the defendant had filed an unconditional appearance, it had lost its right to make an application to strike out any writ and statement of claim on the ground of locus standi under O 18 r 19(1) of the RHC, based on Supreme Court decision of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995]

1 MLJ 241. The relevant part of the decision of Jemuri Serjan CJ (Borneo) states at p 258:

> It was open to the defendants to resort to O 18 r 19 or O 33 r 2 of our RHC but they chose not to do so but to bring up the locus standi issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded.

The first thing that needs to be determined is under which paragraph of r 19(1) the issue of locus standi falls. When dealing with the issue of locus standi, it actually concerns jurisdiction of the court. Hence it should fall under para (a) of r 19(1) which deals with 'reasonable cause of action'. When para (a) is involved then r 19(2) has to be invoked. It states:

> No evidence shall be admissible on an application under paragraph (1)(a).

Thus the application of para (a) read together with the provision of r 19(2) must be given different consideration from the other three paragraphs. In other words, if the application under O 18 r 19 of the RHC only involves paras (b), (c) or (d), the applicant has no need to file a conditional appearance, but if the application is in respect of para (a), then, by virtue of r 19(2), the applicant must file a conditional appearance. I have already said that the issue of locus standi actually concerns jurisdiction and therefore is a subject matter that comes within the ambit of para (a) of r 19(1). The defendant in this case not only had filed an unconditional appearance but had also filed its statement of defence. In addition, its application under encl 10 was supported by an affidavit.

In my view, what Jemuri Serjan meant in his judgment in the *Alor Janggus* case when he referred to O 18 r 19 of the RHC was actually referring to para (a) of r 19(1) because that is the only paragraph that concerns locus standi and jurisdiction, and does not possibly fall under any of the other three paragraphs.

In the light of the above, if an application to strike out a writ under O 18 r 19 of the RHC on the ground of jurisdiction is made, the applicant must enter a conditional appearance. However, there are exceptions to this rule. Such exceptions had been discussed by Lai Kew Chai J in the Singapore case of *The 'Avro International', The 'Avro Adventure', 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147. The learned judge in his judgment said at p 149:

> The effect of entering an unconditional appearance is twofold: (1) it waives any irregularity of the writ or its service; and (2) the defendant is considered to have submitted to the jurisdiction of the court: see Vol 1 *The White Book* (1979 Ed) para 12/1/3. A defendant who wishes to set aside the writ or its service for non compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore file a conditional appearance.

In his judgment, Lai Kew Chai J however, recognized the existence of an exception to the general principle. He said at p 150:

> The one exception from the general effect of an unconditional appearance is the situation where a court under any written law lacks jurisdiction to entertain the claim at all, as in *Wilkinson v Barking Corp* [1948] 1 KB 721. There, the defendant was allowed to assert the want of jurisdiction of the court although he had entered an unconditional appearance because a statutory tribunal and not the court was vested with the jurisdiction to entertain the claims of superannuation such as the one asserted by the plaintiff. An exception to the effect of an unconditional appearance was made in that case because the court would otherwise have entertained the claim contrary to law.

In the case of *YAM Tengku Iskandar ibni Almarhum Tengku Ahmad lwn Majlis Perajaan Negeri Kelantan & satu lagi* [1997] 2 MLJ 555, which was heard before me, on an application by the defendant to strike out the writ and statement of claim under O 18 r 19 of the RHC on the ground of jurisdiction, the counsel for the plaintiff raised a preliminary objection because the defendant had entered an unconditional appearance. However in my judgment, I came to the conclusion that this case fell within the exception to the general effect of unconditional appearance because the plaintiffs assertion was a matter which the court had no jurisdiction to hear as such matter would fall within the jurisdiction of Majlis Perajaan Negeri Kelantan. As such, I dismissed the plaintiffs' preliminary objection and allowed the defendant's application.

In this instant application before me, the defendant had entered an unconditional appearance. It now applied to strike out the writ and statement of claim under O 18 r 19 of the RHC and it must fall under para (a) since the issue is on locus standi which in fact concerns the jurisdiction of the court. In order for the defendant to succeed in an application under O 18 r 19(1)(a) of the RHC after having entered an unconditional appearance, it must come within the exception as stated in the case of *Wilkinson v Barking Corporation.* But based on the facts of this case, I was unable to conclude that it could come within the exception because the plaintiff's assertion was a matter which this court would have jurisdiction. In the case of *YAM Tengku Iskandar*, the court did not have jurisdiction to hear the case since the appropriate forum to hear the assertion would be the Majlis Perajaan Negeri Kelantan. Therefore, this instant case was clearly distinguished from the case of *YAM Tengku Iskandar.*

For the reasons as I have stated above, I allowed the plaintiffs' appeal with costs. In the light of this ruling, it would no longer be open for the defendant to file afresh this application as granted by the learned SAR. To that extent, the ruling of the SAR is set aside.

Defendant's appeal dismissed and plaintiff's appeal allowed with costs.

Reported by Wong Ee Lynn